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No. 89-7272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RONALD HARMELIN,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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## COUNTER-STATEMENT OF THE CASE

The instant petition arises out of a criminal case heard in the Sixth Circuit Court for the Count of Oakland. In that case, the Defendant-Petitioner Ronald Harme in was charged with the offenses of Possession Of Over 650 Grams O Cocaine [MCL 333.7403(2)(i); MSA 14.15(7403)(2)(i)], and Felony-Firearm [MCL 750.227b; MSA 28.424(2)]. The People alleged that those offenses were committed on May 12, 1986 in Oak Park, Michigan. Prior to trial, the Defendant brought a motion to suppress and an evidentiary hearing was conducted beginning on November 12, 1986.

First to testify at that hearing was Officer Calvin Rix of the Oak Park Public Safety Department and a 17-year police veteran. (T 11/12/86, 8) On May 12, 1986 at 2:45 a.m., Officer Rix was on patrol with his partner, Officer Blakeney, in the parking lot of the Embassy Motel in Oak Park. (T 11/12/86, 8) The officers were there checking vehicle VIN numbers and looking for stolen cars. (T 11/12/86, 8) At that time, Officer Rix testified that he observed a 1977 blue Ford LTD exit the parking lot and he again observed the car at 4:00 a.m. and at 5:00 a.m. (T 11/12/86, 9-10) On the third occasion, the car ran a red light at the intersection of Hubbell and Eight Mile Road. (T 11/12/86, 10) Officer Rix pursued the car, effected a traffic stop and observed that the Defendant was the driver and sole occupant. (T 11/12/86, 11)

The witness requested the Defendant's registration, driver's license and proof of insurance and those were produced. (T 11/12/86, 11) The Defendant exited his vehicle and began

walking back toward the patrol car when he volunteered information to the effect that he had a pistol in an ankle holster and that he had a CCW permit for the gun. (T 11/12/86, 11, 32) Officer Rix also observed several bulges in the Defendant's coat and became concerned for his own safety, suspecting that the Defendant might have more weapons on his person. (T 11/12/86, 12) He informed Officer Blakeney of the gun and they conducted a pat-down of the Defendant. (T 11/12/86, 12, 40-41) The Defendant was not under arrest at the time and the gun in the ankle holster was not immediately seized. (T 11/12/86, 33, 38)

Officer Blakeney felt a hard object in the Defendant's coat and inquired as to what it was. The Defendant replied that it was his marijuana. (T 11/12/86, 13) The object was removed and it was observed to be a cigarette case containing marijuana cigarettes. (T 11/12/86, 13) The Defendant was then placed under arrest for marijuana possession and he was searched pursuant to the arrest. (T 11/12/86, 13) A pouch was found in another coat pocket which contained Percodan pills, three vials of white powder and drug paraphernalia. (T 11/12/86, 14) An envelope containing ten small baggies of white powder and a beeper were also found on the Defendant's person. (T 11/12/86, 14, 52-54)

Following the Defendant's arrest, Officer Rix testified that the Defendant's car was impounded because it was in a traffic lane, it was a felony arrest, and because of possible action under the Forfeiture Act. (T 11/12/86, 14, 56) A short while later, an inventory search was conducted and a black satchel containing a shaving kit bag was found in the trunk. (T



11/12/86, 15, 63-65) The shaving kit bag contained two bags in which was a large amount of white powder subsequently shown to be cocaine. (T 11/12/86, 15, 73-75) After Officer Rix's testimony, the evidentiary hearing was adjourned to January 12, 1987. On that date, Officer Blakeney testified to being in the Embassy Motel parking lot looking for stolen cars and to observing the Defendant's car at 2:45 a.m., 4:00 a.m. and 5:00 a.m. (T 1/12/87, 5-7) He also described the traffic violation, the stop of the Defendant's car and the pat-down search after the Defendant exited from his car. (T 1/12/87, 7-8, 25-27) Officer Blakeney also noticed that the Defendant's pockets were bulging and that he appeared very nervous. (T 1/12/87, 9, 28-30)

As he patted the Defendant's coat, he felt a hard object and said, "What's this?" The Defendant replied, "That's my marijuana." (T 1/12/87, 9) The officer then pulled the object out and discovered that it was a cigarette case containing marijuana cigarettes. The pouch containing pills and vials of white powder was also found as well as the beeper and ten packets of white powder. (T 1/12/87, 10-11) Officer Blakeney also testified to the impoundment of the Defendant's car and the inventory search of the trunk which uncovered a large amount of cocaine and $2700.00 in cash. (T 1/12/87, 11-12, 37-40) At the conclusion of Officer Blakeney's testimony, and after argument by counsel for the respective parties, the court denied the Defendant's motion to suppress. (T 1/12/87, 60)

A bench trial was held in this matter on February 26, 1987. Prior to the submission of proofs, the parties stipulated

to the admission of 19 exhibits, including the gun and permit, the drugs, the various containers they were found in, the drug paraphernalia and the toxicology report. (T 2/26/87, 6-8) Officer Rix then testified in a manner consistent with his testimony at the evidentiary hearing as to why he was at the Embassy Motel (T 2/26/87, 27-29), his observations of the Defendant's car (T 2/26/87, 30-33), the traffic violation and the stop (T 2/26/87, 33) Defense counsel stipulated that the area in question was a high crime area. (T 2/26/87, 28) Officer Rix also testified as to the Defendant exiting his vehicle, volunteering the information about the gun, his nervous appearance and the bulges in his coat. (T 2/26/87, 34-36) The witness reiterated his earlier testimony concerning the pat-down, the discovery of the hard object, the Defendant's admission that it contained marijuana, and the subsequent discovery of other drugs, paraphernalia and the beeper on the Defendant's person. (T 2/26/87, 37-39) Finally, Officer Rix again described the impoundment and inventory search of the Defendant's car and the discovery of the cocaine and cash in the trunk. (T 2/26/87, 40-48)

On cross-examination, Rix testified that the pat-down search of Defendant was made out of fear for the officers' safety. Defendant admitted having a gun in an ankle holster and had bulges in his pockets. (T, 2/26/87, 84-85) According to Rix:

> A If he had, in fact, guns in his pockets where the bulges were, they could have been used on me, and I wouldn't have had a chance to respond.
> (T, 2/26/87, 85-86)



Defense counsel questioned what difference it made if Defendant had a number of guns on his person given that Defendant had a general concealed weapon permit. (T, 2/26/87, 75, 85):

> Q [Defense Counsel] Let me ask you something: If, in fact, you patted him down and you turned up two more guns, so what? What would you have done then?
>
> * * *
>
> Q (By Mr. Rundell, continuing) So what? What then? Now you've got two more guns. So what?
> A I would have been safe.
> Q You would have had to give them back to him, wouldn't you?
> A Eventually, yes. I would have had them in my possession.
> Q Until you had to give them back to him?
> A That's correct, and they would have been unloaded when I gave them back.
> Q Well, then why didn't you go immediately for the gun that you knew he had and unload that one if you were concerned?
> A If you bend down when you're patting somebody down to take a gun that's supposedly in an ankle holster, which I could not see, you're down below that person. I'm going to get shot in the head. I'm not going to do that.
> Q Why didn't you ask him to show you the gun then that he had?
> A Do you want to put a gun in somebody's hand and let them shoot you?
> Q No. He could have shown you, could he not, simply by putting his foot up and pulling up his pant leg?
> A Then he has the ability to get it out.
> Q Did Mr. Harmelin in any way threaten you that night?
> A No, he did not.
> Q Did Mr. Harmelin in any way make any overt gesture toward you that you interpreted as being a threat towards your safety?
> A No, he did not.
> Q Did Mr. Harmelin say anything to you from which you concluded that he was threatening your safety?

A He told me he had a gun.
Q All right. But, as a matter of fact, couldn't you conclude from that that if he was going to hurt you, the last thing he would have told you was that he had a gun?

* * *

Q (By Mr. Rundell, continuing) If the man was going to try to pull a gun on you and shoot you, he'd want to surprise you, wouldn't he?
A I suppose, but it's hard to tell.
Q There's not much surprise when he tells you, "I've got a gun," is there?
A You don't know out there.
(T, 2/26/87, 87-89)

Prior to the conclusion of cross-examination of Officer Rix, Michigan State Police Trooper Diane DeWitt was called out of order to testify and she was qualified as an expert in the field of fingerprint analysis. (T 2/26/87, 92) She identified fingerprints from the Defendant which were found on books contained in the satchel in his car's trunk that were directly adjacent to the large bags of cocaine. (T 2/26/87, 96-99) Officer Blakeney also testified out of order and in a manner consistent with his testimony at the evidentiary hearing. He once again described the stop (T 2/26/87, 111-112), the pat-down of the Defendant (T 2/26/87, 112-113), the post-arrest search of the Defendant (T 2/26/87, 113-114) and the impoundment and inventory search of the Defendant's car. (T 2/26/87, 117-119) Cross-examination of Officer Rix was then concluded and the People rested. (T 2/26/87, 170) The Defendant presented no witnesses and also rested. In his closing argument, the prosecutor noted that the toxicology report reflected an amount of 672.5 grams of cocaine in the packages found in the Defendant's



satchel. (T 2/26/87, 173) The prosecutor also commented on the Defendant's address book which contained coded instructions apparently related to drug trafficking. (T 2/26/87, 175)

Following closing arguments and its findings of facts, the trial court found the Defendant guilty on both of the charged offenses. (T 2/26/87, 197) On April 30, 1987, the Defendant was sentenced to mandatory terms of two years and life imprisonment for his convictions. (T 4/30/87, 3-4)

Defendant appealed his convictions as of right. The People accept the portion of Petitioner's Statement of the Case describing the appellate history of this case.

## REASONS FOR DENYING THE WRIT

I. THE TRIAL COURT COMMITTED NO ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

In the trial court and on appeal, the Defendant has raised numerous challenges to the propriety of the various searches and seizures conducted by the police herein. To do so, the Defendant incorrectly attempts to frame the Fourth Amendment issues of this case within the framework of a "Terry" investigatory stop, see Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). He then initially argues that the pat-down search resulting in the discovery of drugs on his person was invalid since the police officers could not have reasonably suspected that criminal activity was afoot.

The Defendant's reasoning in that regard is factually flawed from the outset since the stop in this matter was a valid traffic stop for the civil infraction of running a red light, MCL 257.611; MSA 9.2311. In light of their observations, Officer Rix and Blakeney were entirely justified in conducting the traffic stop herein. As such, the initial stop was not within the meaning of Terry, supra. See also People v Laube, 154 Mich App 400; 397 NW2d 325 (1986).

In further contrast to the Defendant's argument, the People submit that the pat-down search which followed the traffic stop was an entirely reasonable measure intended to protect the safety of the investigating officers under cases such as People v Grimmett, 97 Mich App 212; 293 NW2d 768 (1980). To justify such a pat-down, the officer in question must be able to point to particular facts from which he could reasonably conclude that a



person was armed and dangerous. People v Parham, 147 Mich App 358; 382 NW2d 786 (1985), Sibron v New York, 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968).

Once a police officer has legitimately stopped a person or vehicle for a civil infraction, a bulge in the person's pocket, his furtive behavior or other circumstances can permit the officer to reasonably suspect that the person is armed and dangerous, thereby justifying the limited intrusion of a pat-down search. People v Blackburne, 150 Mich App 156; 387 NW2d 850 (1986), Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). In particular, bulges in a person's pockets can justify further inquiry by a police officer following a traffic stop, People v Ingram, 412 Mich 200; 312 NW2d 652 (1981), and a police officer's experience is a consideration in determining whether he reasonably believed that a pat-down search was required as a safety measure. People v Lillis, 64 Mich App 64; 235 NW2d 65 (1975).

In the case at bar, Officers Rix and Blakeney had 17 years and 20 years experience respectively. They were located in a high-crime area at night and had observed the Defendant's car on three occasions in the early morning hours on the day in question. The Defendant appeared nervous and there were several bulges in his coat when he exited from his vehicle. He himself volunteered that he was armed with a pistol. In light of those circumstances, Officer Rix and Blakeney were entirely justified in conducting the pat-down search for their own protection. Contrary to the Defendant's position, his possession of a CCW

permit did not automatically mean that he was not a potentially dangerous person. His accessibility to a handgun in an ankle holster under a trouser leg may have been somewhat limited and obvious, but the bulges in his coat represented a clear, potential and imminent danger to which he had ready access if in fact the bulges were made by weapons. Under the circumstances, the officers' pat-down of the Defendant can only be regarded as a reasonable and prudent step intended solely for their protection.

The Defendant next contends that the inquiry and examination of the cigarette case containing marijuana which was discovered during the pat-down was improper. Apparently, the Defendant has misread the facts of this case when he argues that the discovery of, and inquiry concerning, the cigarette case was beyond the scope cf a pat-down for weapons. In that regard, Officer Blakeney testified as follows:

Q Ok, so then what did you do?
A I started to do a pat down.
Q Was there anything, if I can back up, unusual about his appearance?
A Well, his pockets in his coat were bulging. And he appeared to be a little bit nervous.
Q Ok, so then what did you do?
A I started to do a pat down first. I grabbed his coat, with my - right in the chest area here, with my right hand. And I grabbed a hard object; my thumb on the bottom and my finger on top.
Q Where was this on the Defendant?
A Right here in the bosom area.
Q Ok, you're indicating his right chest area, correct?
A Yes, sir.
Q All right. You say you felt a hard object?
A Yes, sir, I did.
Q Ok, then what happened?
A I held onto it --
Q Why is that?
A Because I thought it was a gun.



Q Ok.
A And I asked him, I said, "What's this?" And he said, "That's my marijuana."
Q Ok, then what happened?
A He was - we took the - I reached into his pocket, and I pulled out a brass cigarette case, along with a black pouch.
Q Now, what area? Is this the area where you felt the hard object?
A Right, same hard object. I reached in, and pulled out, yes.
Q So you reached in, and what did you --
A I reached around inside his coat, and pulled it out. I grabbed what was in the pocket; it was a black pouch, along with the cigarette case.
Q Ok, so was that all in one action?
A Yes, it was.
Q Ok. Then when you pulled the objects out of his pocket, then what happened?
A Ok, I opened the cigarette case, and there was what appeared to be marijuana cigarettes. I advised him he was under arrest for possession of marijuana.

(T 1/12/87, 8-10)

At the time that the pat-down was initiated, the Defendant was not under arrest, nor was he the focus of a criminal investigation. As such, he was not entitled to Miranda[1] warnings, nor was there any violation of his Fourth Amendment rights. Rather than simply indicate that the object was a cigarette case, the Defendant volunteered that it was his marijuana. Only after that admission did Officer Blakeney remove the object from the Defendant's clothing and view its contents. Under the circumstances, there was absolutely no impropriety in the officer's actions.

The Defendant also challenges the legal validity of the impoundment of his vehicle. More specifically, he alleges that

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Miranda V Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

the quantities and types of drugs found on his person were insufficient to provide cause to believe his vehicle was involved in a drug transaction and subject to forfeiture under MCL 333.7521(d); MSA 14.15(7521)(d). Again, however, the Defendant misreads the facts of this case. After his arrest for marijuana possession, the investigating officers discovered the pouch with three vials of suspected cocaine, percodan pills, amphetamines, and four separate implements for cocaine ingestion on his person. Additionally, the envelope with ten packets of suspected cocaine and a beeper were found in his pockets. The variety, amounts, and type of packaging of the drugs and paraphernalia found on the Defendant clearly gave rise to the reasonable inference that he was a drug dealer engaging in illegal drug transactions. Since his vehicle was a conveyance obviously used in furtherance of that activity, there is little doubt that it was properly subject to impoundment and forfeiture pursuant to the cited statute.

Finally, the Defendant attacks the legality of the inventory search of his vehicle and of the satchel discovered in the trunk. Clearly, however, an inventory search of a lawfully impounded vehicle is proper as long as it is conducted pursuant to a standard police department procedure. People v Long (On Remand), 419 Mich 636; 359 NW2d 194 (1984). In the instant case, Officer Rix testified that both the vehicle impoundment and the inventory search were conducted pursuant to established procedures. The inventory search of the trunk of a vehicle is also permissible when reasonably conducted to protect the police or public or to avoid claims against the police for allegedly lost



or stolen property. Cady v Dombrowski, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973), People v Hence, 110 Mich App 154; 312 NW2d 191 (1981). Under similar reasoning, the search of containers found in the truck of a vehicle during a valid inventory search is also permissible. South Dakota v Opperman, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976), Colorado v Bertine, 479 US 367; 107 S Ct 738; 93 L Ed 2d 739 (1987), People v Merchant, 86 Mich App 355; 272 NW2d 656 (1978).

Moreover, even if the search of the automobile did not fall within the inventory search exception, the Court of Appeals properly ruled that the search fell within the automobile exception to the warrant requirement because there was probable cause to believe that Defendant's car contained more controlled substances. People v Harmelin, 176 Mich App 524, 534 (1989).

A trial court's ruling on a motion to suppress should not be overturned unless clearly erroneous; that is, if the reviewing court is left with a definite and firm conviction that a mistake was made. People v Brown, 127 Mich App 436; 339 NW2d 38 (1983), People v Randle, 133 Mich App 335; 350 NW2d 253 (1984), People v Kerschner, 132 Mich App 623; 348 NW2d 282 (1984). The People submit that in light of the record of this case and the applicable law, no clear error or mistake was made by the trial court in denying the Defendant's motion to suppress.

II. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

With reference to the above argument, the Defendant alleges that his trial attorney was ineffective insofar as he couched the trial defense in terms of a legal attack on the validity of the searches herein as opposed to a factual attack on the evidence probative of the Defendant's guilt. Apparently, the Defendant believes that his attorney should have been more forceful in arguing his innocence based upon the facts. A review of the record herein as well as the applicable law shows that the Defendant's claim is factually and legally unsupported.

In People v Dalessandro, 165 Mich App 569, 573; 419 NW2d 609 (1988), the Court of Appeals adopted the federal standard for determining claims of ineffective assistance of counsel as follows:

> In Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the Supreme Court set forth the test to be used in reviewing claims of ineffective assistance of counsel. First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant under the Sixth Amendment. The objective standard of reasonableness must be used in determining whether defense counsel meets this threshold. Strickland, supra, pp 687-688. The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Id., p 689. Second, the deficiency must be prejudicial to the defendant. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Id., pp 691-692.

In every respect, the Defendant's claim fails to meet the above-cited test.



First, when viewed under the objective standard of reasonableness, there has been no showing of deficiency on the part of defense counsel since the choice of defense posture was clearly a matter of trial strategy. In light of the overwhelming evidence of guilt, defense counsel quite correctly realized that his client's only hope was to attack and prevent the admissibility of the inculpatory evidence on technical grounds. Matters of trial strategy will not give rise to a claim of ineffective assistance of counsel, People v Roberson, 90 Mich App 196; 282 NW2d 280 (1979), even where they seem erroneous with hindsight as long as they appeared sound to a competent, criminal attorney. People v Blue, 114 Mich App 137; 318 NW2d 498 (1982). In the present case, even with hindsight, defense counsel's trial strategy does not appear erroneous.

The Defendant also fails to show how defense counsel's alleged error was prejudicial. The Defendant suggests that trial counsel could have argued that the evidence failed to show knowledge and intent relative to possession of the drugs in the trunk of his car. Such an argument would have stretched counsel's credibility to the limit. It should be recalled that the cocaine was discovered in the Defendant's satchel located in his car. Objects with his fingerprints on them were discovered in close proximity to the narcotics. The Defendant possessed the same type of drug on his person in various containers. Given those facts, a defense based on ignorance of the existence of the drugs would have been patently unbelievable.

The Defendant incorrectly relies on cases such as Wiley v Sowders, 647 F2d 642 (CA 6, 1981) and People v Fisher, 119 Mich App 445; 326 NW2d 537 (1982). Those cases involved situations where defense counsel either stood mute and did nothing or consented to the equivalent of a guilty plea. A review of the record herein shows that defense counsel skillfully sought to guarantee his client's rights and to prevent the admission of evidence that was overwhelmingly probative of guilt. Effective assistance of counsel does not necessarily mean successful assistance of counsel. People v Higginbotham, 21 Mich App 489; 175 NW2d 557 (1970). The Defendant has totally failed to show that his trial attorney was in any way ineffective.

The Court of Appeals' conclusion should be affirmed, 176 Mich App at 535:

> The evidence against defendant was overwhelming, and counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choice of strategy was not the functional equivalent of a guilty plea, and defendant was afforded his constitutional right to plead not guilty. People v Schulz, 85 Mich App 527; 271 NW2d 305 (1978); People v Fisher, 119 Mich App 445; 326 NW2d 537 (1982).



**III. THE MANDATORY SENTENCE IMPOSED HEREIN DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.**

The Defendant makes the largely emotional argument that the statutorily-mandated sentence of life imprisonment which was imposed following his conviction constituted cruel and unusual punishment because it has "thrown [him] into the pit of prison for all eternity." (Petitioner's Brief, p 23) In support of that argument, he makes the unusual but irrelevant points that he could have legally possessed over 650 grams of cocaine in Peru and that he could have legally possessed over 650 grams of cyanide in Michigan. The Defendant cites no legal authority in support of his position that is factually on point.

In very brief response to the Defendant's posture, the People note that on numerous occasions the Court of Appeals has rejected the argument that the mandatory life sentence for possession of 650 grams of cocaine is cruel or unusual. People v Harding, 163 Mich App 298; 413 NW2d 777 (1987), People v Ward, 133 Mich App 344, 357; 351 NW2d 208 (1984); People v Harman, 124 Mich App 93, 98; 333 NW2d 591 (1983), lv den 417 Mich 1100.45 (1983); People v Puertas, 122 Mich App 626, 630; 332 NW2d 399 (1983), lv den 417 Mich 1056 (1983); People v Kaigler, 116 Mich App 567, 572-573; 323 NW2d 486 (1982); People v Campbell, 115 Mich App 369, 376-381; 320 NW2d 381 (1982), lv den 417 Mich 879 (1983); People v McCarty, 113 Mich App 464; 317 NW2d 659 (1982), lv den 414 Mich 958 (1982).

The Sixth Circuit Court of Appeals in Young v Miller, 883 F2d 1276, 1282-1286 (CA 6, 1989) recently rejected an

argument similar to Defendant's involving the imposition of Michigan's mandatory life sentence for drugs upon a first offender. Although observing that "the tiger trap may have sprung upon a sick kitten," the Sixth Circuit found that the punishment was not cruel and unusual under US Const, Amend VIII. 883 F2d at 1285-1286. The Court in evaluating the gravity of drug offenses adopted the 5th Circuit's observation, 883 F2d at 1283:

> "Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image--others who create others still, across our land and down our generations, sparing not even the unborn." Terrebonne v Butler, 848 F.2d 500, 504 (5th Cir. 1988) (en banc), cert. denied, ____ US ____; 109 S.Ct. 1140; 103 LEd 2d 201 (1989).

While the Defendant portrays himself as an innocent and misguided individual with no prior record, it is clear that he possessed well over 650 grams of cocaine, some of which was individually packaged for apparent resale. He also possessed other types of narcotics, paraphernalia for drug use by himself and others, and a weapon. His possession of a beeper and the coded instructions in his address book would also seem to erode his contention that his crime was an isolated mistake in judgment. The People submit that the penalty imposed was proportionate to the offense and it did not constitute cruel and unusual punishment.



**IV. DEFENDANT HAS FAILED TO SUPPORT HIS INFLAMMATORY CHARGE THAT THE COURT OF APPEALS WAS "INFLUENCED BY SOME SORT OF EX PARTE COMMUNICATION OR POLITICAL PRESSURE" AND THAT IT REVERSED ITSELF IN A SITUATION WHERE IT LACKED JURISDICTION.**

Caught up in his rhetoric concerning the ready access of cocaine in Peru, the burning of witches in Salem and the legality of possessing cyanide (Petitioner's Brief, pp 21,22,24), Defendant charges that there was something improper about the Court of Appeals' decision to reverse its earlier ruling:

> The defense can only conclude that the court was influence [sic] by some sort of ex parte communication or political pressure.
> (Petitioner's Brief, 27)

The defense makes this accusation even though it is clear that the Court of Appeals in its first opinion failed to consider the limiting proviso found in the search and seizure provision of Michigan's Constitution. Const 1963, art 1, § 11.

Defendant has failed to offer any evidence whatsoever to support his claims of improprieties.

As it is, it is surprising that Defendant would rest his claims solely on a misunderstanding of Michigan appellate practice. Defendant misconstrues the teaching of People v George, 399 Mich 638 (1977) and other Michigan case law. MCR 7.302(F)(3) of the Michigan Court Rule of 1985 makes clear that jurisdiction over a case is vested in the Supreme Court only after leave to appeal is granted. If leave is denied, then jurisdiction would revest in the circuit court. At the time the prosecution's application was pending in the Michigan Supreme Court, jurisdiction was still with the Court of Appeals. The

timely application to the Supreme Court merely stayed the Court of Appeals decision as a final adjudication. People v Phillips, 416 Mich 63, 74 (1982).

Since jurisdiction was still with the Court of Appeals, it properly issued the order it did on March 9, 1989, [MCR 7.216(A)(7)] and its subsequent Opinion of April 18, 1989. At the time the prosecution filed its application for leave to appeal in the Supreme Court, a copy of the application was filed in the Court of Appeals pursuant to MCR 7.302(A)(3). It may be that the Court of Appeals reviewed this application and recognized its initial error. Defendant fails to make out any denial of due process.



## CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Respondent prays that this Honorable Court issue an order denying Petitioner's petition for writ of certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

BY: _____
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Chief, Appellate Division

_____
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DATED: May 3, 1990

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No. 89-7272

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RONALD HARMELIN,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

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STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Dawn I. Johnston, being duly sworn, deposes and says that on the 3rd day of May, 1990, she sent a copy of Respondent's Brief In Opposition To Petition For Writ Of Certiorari To the Supreme Court Of The State Of Michigan, addressed to Ronald Harmelin, In Propria Persona, at #188131, Scott Regional Correctional Facility, Plymouth, Michigan 48170 by depositing same in an envelope with the Oakland County mailing pick-up service.

Further deponent saith not.

Dawn I Johnston

DAWN I. JOHNSTON, Deponent

Subscribed and sworn to before me,
this 3rd day of May, 1990.

Carol A. Theodorovich

CAROL A. THEODOROVICH, Notary Public
Oakland County, Michigan
My Commission Expires: 9/7/92